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Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application No. : 10/725,248
Appellant(s) : Norton, Sharon Ann, et al.
Filed : December 1, 2003
Title : Compositions Comprising Fermentable Fiber Which Are
Adapted For Use By A Companion Animal And Kits And
Methods Of Their Use
TC/A.U. : 1655
Examiner : Clark, Amy Lynn
Conf. No. : 1932
Docket No. : P145
Customer No. : 27752

APPEAL BRIEF

Mail Stop Appeal Brief - Patents
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

Dear Sir,

This Appeal Brief is being filed pursuant to the appeal from the U.S. Patent and Trademark Office decision mailed June 27, 2006 finally rejecting Claims 1-12 and 14-23. A Notice of Appeal was timely filed on September 8, 2006. Submitted herewith are an Appeal Brief and a Petition for a Five (5) Month Extension of Time and the fee required under 37 CFR §1.17(a), providing for a timely response up to and including April 8, 2007. All related fees are to be charged to the Assignee's Deposit Account #16-2480.

REAL PARTY IN INTEREST

The real party in interest is The Procter & Gamble Company of Cincinnati, Ohio.

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Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
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Final Rejection: June 27, 2006
Customer No. 27752

RELATED APPEALS AND INTERFERENCES

There are no known related appeals, interferences, or judicial proceedings.

STATUS OF CLAIMS

Claims 1-12 and 14-23 are pending in the present application. Claim 13 and Claims 24-53 are withdrawn. Claims 1-12 and 14-23 are appealed.

A complete copy of the appealed claims is set forth in the Claims Appendix attached herein.

STATUS OF AMENDMENTS

No amendment was filed.

SUMMARY OF CLAIMED SUBJECT MATTER

The present invention provides compositions, kits, and methods which are useful for providing gastrointestinal health benefits, and reducing fecal odor, in a companion animal. The compositions, kits, and methods utilize fermentable fiber. Compositions of the present invention can be provided in a liquid form for use by a companion animal. The compositions are described beginning at Page 3, line 29 of the specification. Kits of the present invention can include the composition and information regarding gastrointestinal health, and/or fecal odor management. The kits are described beginning at Page 10, line 19. Methods of the invention include methods of improving gastrointestinal health and/or fecal odor of a companion animal. The methods are described beginning at Page 11, line 13.

GROUND OF REJECTION TO BE REVIEWED ON APPEAL

(I) Rejection of Claims 1-12 and 14-23 Under 35 USC § 112, second paragraph.

(II) Rejection of Claims 1, 6-9, 14, 15, and 18-21 Under 35 USC § 102(b) over US Patent 4,241,093 to Farag et al. (hereafter "Farag").

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27732

(III) Rejection of Claims 1-5 and 14-17 Under 35 USC § 102(b) over pending US Patent Application No. US 2002/0054923 A1 to Suzuki et al. (hereinafter "Suzuki").

(IV) Rejection of Claims 1, 2, 4-12, 14, 15, and 18-23 Under 35 USC § 102(b) over pending US Patent Application No. US 2003/0099759 A1 to Cheuk et al. (hereinafter "Cheuk").

ARGUMENT

I. Claims 1-12, 14-23 are not indefinite because the phrase "at least about" is fully defined, described and exemplified in the present specification.

The Examiner asserts that the phrase "at least about" renders the claims indefinite because it is unclear whether the limitation(s) following the phrase are part of the claimed invention.

The Applicants respectfully traverse the rejection. The Examiner asserts that the phrase "at least" means a minimum of 0.25% and that the term "about" means approximately 0.25%. Therefore, the Examiner asserts that the two phrases are ambiguous when used together. The Examiner cites MPEP § 2173.05(d).

The Examiner has cited the wrong MPEP section and provided no analysis regarding the conclusions drawn by the Examiner. MPEP § 2173.05(d) addresses "exemplary claim language" including "for example" and "such as". Therefore, this section is not the appropriate section to be used for guidance when analyzing the term "about" and the phrase "at least about".

However, the cited MPEP section refers to MPEP § 2173.02 for guidance. MPEP § 2173.02 states that the test for definiteness is whether "those skilled in the art would understand what is claimed when the claim is read in light of the specification". *Orthokinetics, Inc. v. Safety Travel Chairs, Inc.* 806 F.2d 1565, 1576, 1 USPQ2d 1081, 1088 (Fed. Cir. 1986). In the Applicants' previous arguments, the Applicants also cited *North American Vaccine, Inc. v. American Cyanamid Co.*, 7 F.3d 1571, 28 USPQ2d 1333 (Fed.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

Cir. 1993, cert. denied, 511 US 1069 (1994)), wherein the Court stated that "Whether a claim is invalid for indefiniteness depends on whether those skilled in the art would understand the scope of the claim when the claim is read in light of the specification."

The Applicants assert that based on the description in the specification, beginning at page 6, lines 17-31 wherein it is disclosed that the compositions of the present invention comprise at least about 0.25% total fermentable fiber, by weight of the composition, and wherein by "total fermentable fiber" it is meant that the referenced level is determined by adding the relative amounts of each fermentable fiber present in the composition, one of skill in the art would indeed understand the scope of the claims when read in light of the specification.

Furthermore, MPEP § 2173.05(a) addresses the term "about" and the phrase "at least about". The phrase "at least about" was only held indefinite where there was close prior art and there was nothing in the specification, prosecution history, or the prior art to provide any indication as to what range of specific activity was covered by the term "about". See *Amgen, Inc. v. Chugai Pharmaceutical Co.*, 927 F2d 1200, 18 USPQ2d 1016 (Fed. Cir. 1991).

Thus, the Examiner has not addressed MPEP § 2173.05(a), nor made any rejection based on MPEP § 2173.05(a). As indicated above, there is indeed disclosure in the specification to provide indication as to what amount of total fermentable fiber is added, and there is indication as to the meaning of the term "total fermentable fiber" and the amounts of various fibers making up the "total fermentable fiber". For example, the meaning of the term "total fermentable fiber", and examples of various ranges and amounts of fermentable fibers is disclosed beginning at page 6, lines 17-31 of the present specification.

Therefore, the Applicants respectfully submit that the rejection is improper, as based on citation of an inapplicable section of the MPEP. Furthermore, the Applicants have demonstrated that the phrase "at least about" is fully defined, described and exemplified in the specification such that one of skill in the art would understand the scope of the claims.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

II. Claims 1-12, 14-23 are patentable over Farag because Farag does not disclose each and every limitation of the Claims.

Claims 1-12, and 14-23 are rejected under 35 USC §102(b) as being anticipated by US Patent No. 4,241,093 to Farag.

The Examiner asserts that Farag discloses a stable, bland, free flowing food supplement comprising sugar beet pulp and that Farag also discloses a composition comprising at least 0.25% fermentable fiber and the Examiner notes that human beings are "companion animals".

In response to the Applicant's previous arguments, that Farag does not disclose fermentable fiber, nor use in a companion animal, the Examiner replies with the analysis that beet pulp includes fiber that is moderately fermentable and that therefore Farag teaches the limitations of the Claims. The analysis used by in Examiner in making the rejection final also asserts that the Applicants' use of the phrase "and the like" in defining "companion animal" extends the definition to include humans, and therefore, the Applicants' composition for companion animals is merely an intended use, does not create a structural difference between the claimed composition and the cited composition, and thus is not limiting. The Applicants respectfully traverse this rejection.

Under § 102, anticipation requires that all the Claim elements appear in a single prior art document. "A Claim is anticipated only if each and every element set forth in the Claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is contained in the ... Claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

The present invention requires in Claim 1 a composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal. Farag never teaches or suggests a liquid composition comprising at least about 0.25% of total fermentable fiber. Farag

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

specifically teaches that the composition is dry and quickly swells in hot or cold aqueous systems, thereby creating a filling and thickening material. See Column 1, lines 54-62.

Additionally, Farag does not teach or suggest that the composition is adapted for use by a companion animal. Although the Examiner attempts to include humans in the definition of companion animal provided in the present specification, humans are not included in the Applicants' definition of companion animal as presented in the specification.

Therefore, the present invention cannot be anticipated by this reference. Because Farag et al. does not disclose each and every element of the present application, it cannot as a matter of law anticipate the present application.

(III) Claims 1-5, 14-17 are patentable over Suzuki because Suzuki does not disclose each and every limitation of the Claims.

The Examiner asserts that Suzuki teaches an agent which is a composition and contains food fibers, including fibers from beet pulp. The Examiner also asserts that Suzuki teaches that the composition is in the form of a drink or food.

In response to the Applicant's previous arguments, that Suzuki does not disclose a composition for use in a companion animal, the Examiner replies with the analysis that the Applicants' use of the phrase "and the like" in defining "companion animal" extends the definition to include humans, and therefore, the Applicants' composition for companion animals is merely an intended use, does not create a structural difference between the claimed composition and the cited composition, and thus is not limiting. The Applicants respectfully traverse this rejection.

Under § 102, anticipation requires that all the Claim elements appear in a single prior art document. "A Claim is anticipated only if each and every element set forth in the Claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

contained in the ... Claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

The present invention requires in Claim 1 a composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal. Suzuki does not teach or suggest that the composition disclosed therein could even possibly be adapted for use by a companion animal. Although the Examiner attempts to include humans in the definition of companion animal provided in the present specification, humans are not included in the Applicants' definition of companion animal as presented in the specification.

Therefore, the present invention cannot be anticipated by this reference. Because Suzuki does not disclose each and every element of the present application, it cannot as a matter of law anticipate the present application.

(IV) Claims 1, 2, 4-12, 14, 15, and 18-23 are patentable over Cheuk because Cheuk does not disclose each and every limitation of the Claims.

The Examiner asserts that Cheuk discloses a canine pet food composition comprising meat, beet pulp in an amount of about 8% to about 16% by weight. The Examiner asserts that Cheuk teaches an amount of fermentable fiber that falls within the range claimed by the Applicants, and therefore anticipates the present invention.

In response to the Applicants' previous arguments that Cheuk does not teach, disclose or suggest a liquid composition, the Examiner asserts that the grain of Cheuk can be mixed with water, and refers to gravy and thickened sauce which can be a component of the composition of Cheuk. The Applicants respectfully traverse this rejection.

Under § 102, anticipation requires that all the Claim elements appear in a single prior art document. "A Claim is anticipated only if each and every element set forth in the Claim is found, either expressly or inherently described, in a single prior art reference." MPEP § 2131 citing *Verdegal Bros. v. Union Oil Co. of California*, 814 F.2d 628, 631, 2 USPQ2D 1051, 1053 (Fed. Cir. 1987). "The Identical invention must be shown in as complete detail as is

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

CLAIMS APPENDIX

1. (Original) A composition comprising at least about 0.25% of total fermentable fiber, by weight of the composition, wherein the composition is a liquid which is adapted for use by a companion animal.
2. (Original) The composition according to Claim 1 comprising at least about 0.5% of total fermentable fiber, by weight of the composition.
3. (Original) The composition according to Claim 2 which is a drinking water.
4. (Original) The composition according to Claim 3 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.
5. (Original) The composition according to Claim 4 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, fructooligosaccharide, and mixtures thereof.
6. (Original) The composition according to Claim 1 which is a gravy.
7. (Original) The composition according to Claim 6 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

8. (Original) The composition according to Claim 7 comprising at least about 0.5% of total fermentable fiber, by weight of the composition.
9. (Original) The composition according to Claim 8 further comprising one or more nutrients.
10. (Original) The composition according to Claim 9 further comprising meat protein.
11. (Original) The composition according to Claim 10 comprising at least about 0.5% protein and at least about 1% fat, by weight of the composition.
12. (Original) The composition according to Claim 11 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, fructooligosaccharide, and mixtures thereof.
13. (Withdrawn) The composition according to Claim 12 wherein the total fermentable fiber comprises beet pulp and fructooligosaccharide.
14. (Original) A composition comprising a fermentable fiber selected from the group consisting of beet pulp, short chain oligofructose comprising 1-kestose, nystose, and 1F-beta-fructofuranosylnystose, and mixtures thereof, wherein the composition is a liquid which is adapted for use by a companion animal.
15. (Original) The composition according to Claim 14 comprising at least about 0.05% of total fermentable fiber, by weight of the composition.
16. (Original) The composition according to Claim 15 which is a drinking water.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

17. (Original) The composition according to Claim 16 comprising from about 0.1% to about 20% of total fermentable fiber, by weight of the composition.

18. (Original) The composition according to Claim 15 which is a gravy.

19. (Original) The composition according to Claim 18 comprising from about 0.1% to about 20% of total fermentable fiber, by weight of the composition.

20. (Original) The composition according to Claim 19 further comprising a further fermentable fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide additional to the short chain oligofructose, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

21. (Original) The composition according to Claim 19 further comprising one or more nutrients.

22. (Original) The composition according to Claim 21 further comprising meat protein.

23. (Original) The composition according to Claim 22 comprising at least about 0.5% protein and at least about 1% fat, by weight of the composition.

24. (Withdrawn) A kit comprising:

- (a) the composition according to Claim 1; and
- (b) information selected from the group consisting of:
 - (i) that the composition is adapted for use by a companion animal;
 - (ii) that the composition is useful for enhancing gastrointestinal health;
 - (iii) that the composition is useful for improving the fecal odor of the feces of a companion animal; and

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

(iv) combinations thereof.

25. (Withdrawn) The kit according to Claim 24 wherein the composition comprises at least about 0.5% of total fermentable fiber, by weight of the composition.

26. (Withdrawn) The kit according to Claim 25 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

27. (Withdrawn) The kit according to Claim 26 wherein the composition comprises from about 1% to about 20% of total fermentable fiber, by weight of the composition.

28. (Withdrawn) The kit according to Claim 27 wherein the composition is a drinking water.

29. (Withdrawn) The kit according to Claim 27 wherein the composition is a gravy.

30. (Withdrawn) The kit according to Claim 29 wherein the composition comprises from about 2% to about 10% of total fermentable fiber, by weight of the composition.

31. (Withdrawn) A kit comprising:

- (a) the composition according to Claim 14; and
- (b) information selected from the group consisting of:
 - (i) that the composition is adapted for use by a companion animal;
 - (ii) that the composition is useful for enhancing gastrointestinal health;
 - (iii) that the composition is useful for improving the fecal odor of the feces of a companion animal; and

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

(iv) combinations thereof.

32. (Withdrawn) The kit according to Claim 31 wherein the composition comprises at least about 0.05% of total fermentable fiber, by weight of the composition.

33. (Withdrawn) The kit according to Claim 32 wherein the composition further comprises a further fermentable fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide additional to the short chain oligofructose, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

34. (Withdrawn) The kit according to Claim 32 wherein the composition comprises from about 0.1% to about 20% of total fermentable fiber, by weight of the composition.

35. (Withdrawn) The kit according to Claim 34 wherein the composition is a drinking water.

36. (Withdrawn) The kit according to Claim 34 wherein the composition is a gravy.

37. (Withdrawn) A method selected from the group consisting of enhancing gastrointestinal health of a companion animal, improving the fecal odor of the feces of a companion animal, reducing risk of cancer in a companion animal, and combinations thereof, comprising orally administering to the companion animal the composition according to Claim 1.

38. (Withdrawn) The method according to Claim 37 wherein the method comprises at least about 0.5% of total fermentable fiber, by weight of the composition.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

40. (Withdrawn) The method according to Claim 38 wherein the total fermentable fiber comprises a fiber selected from the group consisting of beet pulp, gum arabic, gum talha, psyllium, rice bran, carob bean gum, citrus pulp, pectin, fructooligosaccharide, mannanoligofructose, soy fiber, arabinogalactan, galactooligosaccharide, arabinoxylan, and mixtures thereof.

41. (Withdrawn) The method according to Claim 40 wherein the composition is a drinking water.

42. (Withdrawn) The method according to Claim 40 wherein the composition is a gravy.

43. (Withdrawn) The method according to Claim 42 wherein the oral administration is at least once daily.

44. (Withdrawn) The method according to Claim 42 wherein the composition is contacted with companion animal food prior to oral administration.

45. (Withdrawn) The method according to Claim 42 wherein the composition is admixed with companion animal food prior to oral administration.

46. (Withdrawn) A method selected from the group consisting of enhancing gastrointestinal health of a companion animal, improving the fecal odor of the feces of a companion animal, reducing risk of cancer in a companion animal, and combinations thereof, comprising orally administering to the companion animal the composition according to Claim 14.

47. (Withdrawn) The method according to Claim 46 wherein the composition comprises at least about 0.05% of total fermentable fiber, by weight of the composition.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

48. (Withdrawn) The method according to Claim 47 wherein the composition is a drinking water.

49. (Withdrawn) The method according to Claim 47 wherein the composition is a gravy.

50. (Withdrawn) The method according to Claim 49 wherein the oral administration is at least once daily.

51. (Withdrawn) The method according to Claim 50 wherein the oral administration is concurrent with feeding the companion animal.

52. (Withdrawn) The method according to Claim 49 wherein the composition is contacted with companion animal food prior to oral administration.

53. (Withdrawn) The method according to Claim 49 wherein the composition is admixed with companion animal food prior to oral administration.

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

contained in the ... Claim." MPEP § 2131 citing *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2D 1913, 1920 (Fed. Cir. 1989).

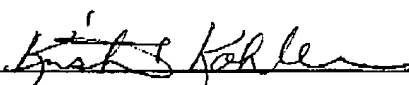
Cheuk specifically discloses a "...meat based material having an essentially *solid* mass assuming the shape of the container in which it is packed..." The composition has "...visually recognizable discrete meat particles with a moisturized appearance upon slicing the pet food mass after departure from the said container." See Column 1, paragraph [0003]. Therefore, Cheuk clearly does not teach a liquid composition. The composition of Cheuk that contains the grains cited by the Examiner is a solid composition. Cheuk does not teach, suggest or disclose a liquid composition containing fiber.

Therefore, the present invention cannot be anticipated by this reference. Because Cheuk does not disclose each and every element of the present application, it cannot as a matter of law anticipate the present application.

SUMMARY

In view of the above, it is respectfully submitted that the aforementioned rejections are erroneous. The Board's reversal of the rejection is respectfully requested.

Respectfully Submitted,
THE PROCTER & GAMBLE COMPANY

By 
Kristin Kohler
Registration No. 41,907
(513) 622-3371

April 3, 2007
Customer No. 27752

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

EVIDENCE APPENDIX

None

Appl. No. 10/725,248
Atty. Docket No. P145
Appeal Brief: April 3, 2007
Notice of Appeal: September 8, 2006
Final Rejection: June 27, 2006
Customer No. 27752

RELATED PROCEEDINGS APPENDIX

None